



**BILLING CODE 6351-01**

## **COMMODITY FUTURES TRADING COMMISSION**

### **Order of the Commodity Futures Trading Commission Relating to the Continuation, Shutdown, and Resumption of Certain Commission Operations in the Event of a Lapse in Appropriations**

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Notice of order; final order.

**SUMMARY:** This order is being issued to provide for the continuation, shutdown, and resumption of certain operations of the Commodity Futures Trading Commission (the “Commission”) in the event of a lapse in appropriations, and to alert all persons regulated by or engaged in proceedings at the Commission of these provisions.

**DATES:** This notice and order is effective on September 27, 2013.

**FOR FURTHER INFORMATION CONTACT:** For market oversight matters contact David Van Wagner, Chief Counsel, Division of Market Oversight (DMO) , at 202-418-5481 or [dvanwagner@cftc.gov](mailto:dvanwagner@cftc.gov), Matthew Hunter, Deputy Director, DMO at 202-418-5861 or [mhunter@cftc.gov](mailto:mhunter@cftc.gov). For clearing matters, contact Ananda Radhakrishnan, Director, Division of Clearing and Risk (DCR), at 202-418-5188 or [aradhakrishnan@cftc.gov](mailto:aradhakrishnan@cftc.gov); Robert B. Wasserman, Chief Counsel, DCR, at 202-418-5092 or [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov); or John C. Lawton, Deputy Director, DCR, at 202-418-5480, or [jlawton@cftc.gov](mailto:jlawton@cftc.gov). For matters involving intermediaries, contact Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight (DSIO), 202-418-5977 or [gbarnett@cftc.gov](mailto:gbarnett@cftc.gov); Thomas Smith, Deputy Director, DSIO, at 202-418-5495 or [tsmith@cftc.gov](mailto:tsmith@cftc.gov); Erik Remmler, Deputy Director, DSIO, at 202-418-7630 or

[eremmler@cftc.gov](mailto:eremmler@cftc.gov); or Kevin Piccoli, Deputy Director, DSIO, at 646–746–9834 or [kpiccoli@cftc.gov](mailto:kpiccoli@cftc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background.**

As of 12:01 a.m. on October 1, 2013, the funding of many federal government activities is set to expire. Unless appropriations are enacted for Fiscal Year 2014, federal departments and agencies whose continued operations are dependent upon such funding—including the Commission—will be required to execute contingency plans for this lapse in appropriations (commonly referred to as a “shutdown”). Under 31 U.S.C. 1341 (the “Antideficiency Act”), the Commission is prohibited from expending or obligating any funds in the absence of appropriations, subject to a narrow set of exceptions.<sup>1</sup> The Commission may use one of the exceptions to the Antideficiency Act set forth in 31 U.S.C. 1342, which permits agencies to obligate funds before an appropriations measure has been enacted and to accept voluntary services during a lapse when certain employees are needed to perform emergency or “excepted” functions.<sup>2</sup>

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<sup>1</sup> The Antideficiency Act provides that an officer or employee of the United States may not make or authorize an expenditure or obligation exceeding an amount in an appropriation or fund for the expenditure or obligation; involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or involve the government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

<sup>2</sup>Section 1342 of Title 31 of the U.S. code provides that an officer or employee of the United States Government may not accept voluntary services for the government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

The Department of Justice’s Office of Legal Counsel has determined that government work performed so that the commodities and futures markets can continue to operate and so that trading may continue qualifies as an “excepted” function as set forth in 31 U.S.C. 1342.<sup>3</sup> OLC Memorandum for the Director of the Office of Management and Budget, Government Operations in the Event of a Lapse in Appropriations, OLC Opinion, at 2-3 (Aug. 16, 1995). Consequently, in the event of a lapse in appropriations, the Commission may incur obligations to allow certain employees who perform “excepted” functions to continue to perform those functions. This authority, however, does not permit the Commission to fund ongoing, regular functions, the suspension of which would not imminently threaten the safety of human life or the protection of property during a lapse in appropriations. *Id.* at 1 (citing 31 U.S.C. 1342). Thus, the Commission has designated certain essential personnel to fulfill its obligation to protect property.

The Commission’s regulations, found in title 17 of the Code of Federal Regulations, place a number of filing obligations on registered entities, intermediaries, market participants and the public within specified time frames, establish Commission authority to stay certain actions by designated and registered entities, and also include provisions relating to requests for Commission approval and issuance of exemption and interpretative relief and guidance with specific time frames for Commission action. The Commission has reviewed its statute and regulations in light of its obligation to protect

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<sup>3</sup> Specifically, the Department of Justice’s Office of Legal Counsel has opined that: “In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate . . . these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.” *Id.*

the safety of human life or the protection of property to determine which Commission operations will continue during a lapse in appropriations.

A. Tolling and Extension of Certain Procedural Time Limits Applicable to the Commission

In the event of a lapse in appropriations, the Commission will not be processing or reviewing filings for Commission discretionary or mandatory approval or any other actions that are not directly related to the safety of human life or the protection of property. Matters not directly related to the protection of property include rule, rule amendment, and contract certifications filed with the Commission, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation, swap execution facility, swap data repository, derivatives clearing organization, and foreign board of trade registration; and other requests for Commission approval or other action.

The above-mentioned matters do not include any emergency notifications that may be required by Commission regulations of designated or registered entities and intermediaries, or that are required by any rule of a registered entity that has been approved by or self-certified to the Commission. This includes emergency rules certified pursuant to regulation 40.6(a)(6) and (7) and emergency changes certified by a systemically important derivatives clearing organization pursuant to regulation 40.10(h).

More specifically, matters not directly related to the protection of property include filings under judicially reinstated regulations 1.47 and 1.48 (bona fide hedge requests), part 30 (regulation 30.10 petitions for exemption and regulation 30.13 requests for certification), part 37 (swap execution facilities applications, demonstrations of

compliance with core principles), part 38 (designated contract market applications, certifications of continued compliance in situations of merger or sale, and demonstrations of compliance with the core principles), part 39 (derivatives clearing organization applications, Commission review of swaps for determinations on clearing requirement, requests for orders regarding competition, and demonstrations of compliance with the core principles), part 40 (rule and contract filings—certifications and approvals and requests for confidential treatment of submissions, stays of certifications pursuant to regulation 40.12, determinations related to making swaps available to trade), part 41 (filing of notice-designated contract markets trading security futures products), part 48 (foreign board of trade registrations, adjudication of additional contracts for trading), and part 49 (swap data repository applications, registration of successor entities).

Matters not directly related to the protection of property additionally include requests pursuant to regulations 145.7 and 145.9 (requests for Commission records, petitions for confidential treatment of information submitted to the Commission, and appeals of FOIA decisions), regulation 140.99 filings (requests for exemptive, no-action and interpretive letters), and part 165 (processing of whistleblower applications and appeals, and payments related to whistleblower awards).

For the foregoing matters that are currently pending before the Commission pursuant to any of these provisions, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations. For such matters, the time remaining for Commission action will begin to run on the first business day following the resumption of Commission operations. For the foregoing matters arising

during a lapse in appropriations, any time limit for Commission action shall begin to run on the first business day following the resumption of Commission operations.

Matters not directly related to the protection of property also include certain procedural regulations associated with Commission adjudicatory actions, in particular certain rules under part 3 (procedure to deny, condition, or suspend, revoke, or place restrictions on registration), part 9 (related to review of exchange disciplinary, access denial or other adverse actions), part 10 (the Commission's rules of practice for adjudicatory proceedings before the Commission), part 12 (rules related to reparations proceedings), and part 171 (review of National Futures Association decisions). For these matters that are currently pending before the Commission pursuant to any of these provisions, or that arise during a lapse in appropriations, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations. Moreover, all applicable filing deadlines for parties to an adjudicative proceeding that arise during a lapse in appropriations will be extended until one business day after the Commission resumes its operations.

B. Continued Processing, Review, and Action Related to Certain Agency Regulations

The Commission's regulations also impose filing obligations on registered entities, intermediaries, market participants and the public. The Commission has determined that certain filing requirements relate to the Commission's obligation to protect the safety of human life or property even during a lapse of appropriations. Accordingly, such filings will continue to review, process, and take any necessary or appropriation action taken, during a lapse in appropriations for the purpose of protecting

the safety of human life or the property in accordance with the Commodity Exchange Act (CEA) and its implementing regulations..

This category includes regulation 1.10 and 5.12 filings (financial reports of futures commission merchants (FCMs), introducing brokers (IBs), and retail foreign exchange dealers), regulation 1.12 and 5.6 filings (notice provisions required of FCMs, IBs, and RFEDs), regulation 1.15 filings (risk assessment reporting requirements), regulation 1.16 filings (reports of accountants), regulation 1.17 filings (capital requirements (business days would include those days the Commission is shut down for purposes of requirements relating to margin calls and the computation of margin) and any notice provision requirements),<sup>4</sup> regulation 1.18 filings (current books and records), regulation 1.65 and 5.23 filings (notice of bulk transfers (a business day would include those days the Commission is shutdown)), regulation 39.19 (derivatives clearing organization reporting requirements), regulation 40.6(a)(6) and (7) (emergency rule certifications), and regulation 40.10(h) (emergency changes certified by systemically important derivatives clearing organizations).

This category also includes part 15 filings (general reporting requirements), part 16 filings (clearing member reports), part 17 filings (FCM reports), part 18 filings (reports by traders), part 19 filings (bona fide hedge position reports), part 20 filings (large trader reporting for physical commodity swaps), part 21 filings (special call provisions), part 190 filings (bankruptcy rules), and regulation 40.6 filings (emergency rules of a registered entity). In addition, the Commission shall process, review, and take any necessary or appropriate action related to, chief compliance officer, swap valuation

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<sup>4</sup> Generally, the Commission's regulations define business day to exclude only Saturday, Sunday, and federal holidays. Thus, a shutdown would not affect the timely processing, review, and action that may be necessary and appropriate related to the operation of these rules.

dispute, and risk exposure reports, pursuant to regulations 3.3(e), 23.502(c), and 23.600(c), respectively, from swap dealers, major swap participants, and futures commission merchants, as applicable.<sup>5</sup> Swap execution facilities, designated contract markets, derivatives clearing organizations, and swap data repositories financial resources reports required by regulations 37.1306, 38.1101, 39.11, and 49.25, respectively, also will continue to be processed, reviewed, and subject to necessary and appropriate action.

The Commission's regulations require and industry practice provides for notification to the Commission and its staff of certain emergency situations. Thus, the Commission will continue to process, review, and take any necessary or appropriate action related to notifications by registered entities and intermediaries of emergency situations such as system malfunctions, cyber security incidents or financial emergencies throughout a lapse in appropriations.

C. Extension of Open Comment Periods on Proposed Regulation and Other Matters that may be Subject to a Request for Comment by the Commission.

Finally, the Commission has proposed a number of rules to implement the CEA and certain provisions of the Wall Street Reform and Consumer Protection Act for which the comment period may expire while the Commission is shutdown. The Commission will be unable to process comment submissions until it resumes full operations, as such processing is unrelated to the protection of property. Therefore, the Commission is extending the comment periods for such rules, and for any other matters that may be subject to a request for comment by the Commission, until one business day after the

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<sup>5</sup> Futures commission merchants are not required to submit swap valuation dispute or risk exposure reports to the Commission under regulations 23.502(c) and 23.600(c), respectively.



Commission is able to resume full operations. Notice of the resumption of Commission operations at the conclusion of a shutdown will be provided on the Commission's website.

## **II. ADMINISTRATIVE COMPLIANCE**

### **A. Administrative Procedure Act.**

To the extent that some of the provisions of this order may be subject to notice and comment under the Administrative Procedure Act (APA),<sup>6</sup> and may be subject to the provisions of the APA that require publication or service of a substantive rule be made not less than 30 days before its effective date,<sup>7</sup> the Commission for good cause finds that notice and comment and a delayed effective date are impracticable and contrary to the public interest. The Commission may be obligated to commence orderly shutdown of its operations at the commencement of business on October 1 and has determined that it is in the interest of the public and the markets it regulates to have established and publicized its procedures for limiting its operations to only those that are essential to the protection of property before that time.

Moreover, though the tolling of certain procedural time limits will delay the Commission's review and approval of certain industry filings, the review and approval provisions in the Commission's regulations implement review and approval provisions of the CEA in order to protect the public interest. It would be contrary to the CEA, and to the public interest, if these review and approval time limits continued to run while the Commission is unable to conduct routine business.

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<sup>6</sup> See 5 U.S.C. 553(b).

<sup>7</sup> See 5 U.S.C. 553(d).

Finally, in order to protect the property interests of the public related to the orderly operation of the futures markets, the Commissioners will be supported by essential personnel in the surveillance of the markets in order to identify any emergency market situations that may require action to protect the safety of human life or property during a lapse in appropriations. It therefore is essential that reporting regulations associated with market surveillance and emergency notices continue to be processed and reviewed.

B. Paperwork Reduction Act.

The Paperwork Reduction Act provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has been approved by the Office of Management and Budget (OMB) and displays a currently valid control number.<sup>8</sup> The collections of information referenced in this notice and order have valid control numbers that are currently in effect. Therefore, the Commission is not obligated to seek a control number in connection with this order.

C. Regulatory Flexibility Act.

The Regulatory Flexibility Act (RFA) requires the Commission to consider whether a rule it proposes will have a significant economic impact on a substantial number of small entities and either provide a regulatory flexibility analysis respecting the significant impact or certify that the rule will not have such an impact.<sup>9</sup> The RFA is applicable only to a rule for which the Commission publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).<sup>10</sup>

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<sup>8</sup> 44 U.S.C. 3501 et seq.

<sup>9</sup> 5 U.S.C. 601 et seq.

<sup>10</sup> 5 U.S.C. 601(2).

The Commission is not publishing this order as a general notice of proposed rulemaking. Therefore, neither a regulatory flexibility analysis nor a certification is required for this rulemaking action. Nonetheless, this order will impose no new regulatory obligations on any party. Rather, it simply establishes the limited regulatory framework under which the Commission will operate during a shutdown in order to ensure the protection of property.

D. Cost Benefit Analysis.

Section 15(a) of the CEA<sup>11</sup> requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) specifies that the costs and benefits shall be considered against five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may give greater weight to one or more of the five enumerated considerations to determine, in its discretion, that a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

This order imposes the cost of delay on parties with petitions for approval, self-certification filings, rights of review, and adjudicative matters before the Commission. As the Commission would be limited by law during a lapse in appropriations to function only with respect to the protection of property, these costs are unavoidable.

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<sup>11</sup> 7 U.S.C. 19(a).

In terms of benefits, this order provides for the limited continuation of Commission business. The order also confirms the ongoing regulatory obligations of registered entities and intermediaries notwithstanding a shutdown, in order to ensure that the Commission has available to it all information necessary to identify emergency situations and take action to protect property and, hence, to protect market participants and the public, the efficiency and financial integrity of the futures markets, and price discovery.

The order also notifies market participants and the public of the matters in which the Commission will be engaged, as well as of the tolling and extensions of time put in place with respect to filings under Commission regulations. Tolling ensures that the Commission will have an opportunity to review routine industry filings once a lapse in appropriations is resolved and take steps if necessary to protect the interests of the market and the public before those filings are finalized. The extensions of time ensure that all persons with filing obligations in certain adjudicative proceedings that arise during a shutdown or who wish to submit comments during a comment period that will close during a shutdown will not be prejudiced by the inability of the Commission to accept those filings or comments.

### **III. ORDER**

In light of the foregoing, the Commission has determined to issue the following Order, pursuant to its authority under the provisions of the Commodity Exchange Act, 7 U.S.C. 1 et seq., and in compliance with the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342.

IT IS HEREBY ORDERED that, in the event of a lapse in appropriations (also referred to as “shutdown”) commencing at 12:01 a.m. on October 1, 2013, the

Commission will commence operating according to the procedures set forth in this Order, with respect to its regulations found in title 17 of the Code of Federal Regulations:

1. Tolling and Extension of Certain Procedural Time Limits. The Commission shall not process any filings, or review any matters for Commission approval or action to the extent that the matters are not directly related to the protection of property for the duration of a shutdown. This applies to rule, rule amendment and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(6) and (7), and emergency changes certified pursuant to regulation 40.10(h); rules, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation, and swap execution facility, swap data repository, derivatives clearing organization, and foreign board of trade registration; and other requests for Commission approval or other action.

Specifically, except as otherwise provided in this order, applications under judicially reinstated sections 1.47 and 1.48, sections 30.10 and 30.13, and parts 36, 37, 38, 39, 40, 41, 48, and 49 of the Commission's regulations officially shall not be processed or reviewed during a lapse in appropriations, and the time limits for Commission action shall be tolled until the resumption of Commission operations at the conclusion of a shutdown. Requests and appeals submitted under sections 145.7 and 145.9 of the Commission's regulations, requests submitted under section 140.99, and filings and payments under part 165 additionally shall not be processed until the resumption of Commission operations.

The time Commission shall process and commence review of any new matters under these provisions of the Commission's regulations beginning on the first full business day

after the Commission is able to resume full operations at the conclusion of a shutdown. For matters that are pending under these provisions at the time a shutdown may commence, all applicable time deadlines for Commission action shall be tolled. The time remaining for Commission action will begin to run on the first full business day after the Commission is able to resume full operations.

This tolling and extension of time limits also shall apply to certain procedural regulations associated with Commission adjudicatory actions, in particular the time-limited procedural regulations in parts 3, 9, 10, 12, and 171. For matters that are currently pending before the Commission under any of these parts, all applicable time deadlines for Commission action shall toll, and the time remaining for Commission action shall begin to run on the first full business day after the Commission is able to resume full operations. Moreover, all time deadlines for filings by a party in an adjudicative proceeding that arise during a shutdown shall be extended until one business day after the Commission resumes its full operations. When a filing in an adjudicatory action is delayed by a shutdown, the time to reply to any delayed filing shall commence on the day the delayed filing is effected under this order.

2. Procedures and Time Limits Not Extended or Tolled. In order to fulfill its obligations to protect property during a lapse in appropriations, which includes market surveillance and intermediary oversight, the Commission shall continue to process and review filings required of a registered entity or intermediary under certain Commission regulations, and take any action necessary and appropriate to preserve property with respect to these filings. These filings are contained in sections 1.10, 1.12, 1.15, 1.16, 1.17, 1.18, 1.65, 5.6, 5.12, 5.23, 39.19, 40.6(a)(6) and (7), and 40.10(h) of the

Commission's regulations, and also apply to any emergency notification to the Commission that may be required by any rule of a registered entity that has been approved by or self-certified to the Commission. In addition, the Commission shall continue to process and review reports to the extent they are required by regulations 3.3(e), 23.502(c), and 23.600(c)(2). Filings under parts 15, 16, 17, 18, 19, 21, and 190 of the Commission's regulations also shall continue to be processed and reviewed.

Review and processing of any notice of emergency actions designated or registered entities are required to report related to situations such as system malfunctions, cyber-security incidents, and financial emergencies shall continue during a shutdown. The Commission additionally shall receive and process reports related to the financial resources of a swap execution facility, designated contract market, derivatives clearing organization, and swap data repository pursuant to regulations 37.1306, 38.1101, 39.11, and 49.25, respectively.

3. Extension of Open Comment Periods on Proposed Regulation and Other Matters that may be Subject to a Request for Comment by the Commission. Any comment period for a proposed rulemaking or other matter that may be subject to a request for comment by the Commission that terminates during a shutdown shall be extended until one business day after the Commission resumes full operations after a shutdown.

4. Resumption of Commission Operations. The Commission shall provide notice of the resumption of its operations at the conclusion of a shutdown on its website at [www.cftc.gov](http://www.cftc.gov).

Issued in Washington, DC on September 27, 2013, by the Commission.

Melissa D. Jurgens,  
Secretary of the Commission.

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